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IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

**No. 229**

SECURITY WAREHOUSING COMPANY, W. B. McKEAND, THE L. C. HYDE & BRITTAN BANK OF BELOIT, and CITIZEN'S BANK OF MUKWONAGO,

*Appellants,*

*vs.*

ELBERT B. HAND, ANDREW DIETRICH and E. McDILL, Trustees of the RACINE KNITTING COMPANY, Bankrupt,

Appeal from the Circuit Court of Appeals for the Seventh Circuit.

## REPLY BRIEF FOR APPELLANTS.

HENRY S. ROBBINS,
*Counsel for Appellants.*

GUNTHORP-WARREN PRINTING CO., CHICAGO

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## REPLY BRIEF.

### I.

THE VALIDITY OF THE WAREHOUSE RECEIPTS AND PLEDGE.

The exigencies of appellees' case seem to have forced their counsel to discuss as *res nova* all the legal questions decided by this court in *Union Trust Company* v. *Wilson*. As this court there fully considered these questions, and counsel presents nothing really new, except a few decisions from the civil law, no reply is here attempted to that portion of appellees' brief.

By the trial court this case was referred to a master with directions to take testimony upon the same and report his findings thereon. (Rec., 38.) He accordingly incorporated his findings of facts into a report.

To that report appellees filed twenty-one exceptions (Rec., 181-185), all of which were overruled by the trial judge, "as either arising upon immaterial issues of the testimony, or not sufficiently supported by testimony to justify review." The Circuit Court of Appeals, except in one or two particulars pointed out in appellants' original brief, also disregarded the alleged facts which appellees sought by these exceptions to have incorporated into the findings of fact, and has decided the case (except as aforesaid) upon the facts disclosed by the master's report. This court has decided that upon such a record the report is to be considered as presumptively correct and to form the basis of the decision of this court unless some serious error is disclosed. (*Crawford* v. *Neal*, 144 U. S., 585, 596.)

Notwithstanding this, appellees' counsel seeks to give a coloring (favorable to them) to the facts of the case by going beyond the master's report for scraps of evidence, which the master has discarded as at variance with the weight of the evidence or as not fairly entitled to the construction appellees seek to place upon them. They say that the master omitted these facts, because they were *uncontroverted* and without them there was enough to condemn appellants' case. But the master was not called upon to decide what facts were enough, because he did not undertake to report his conclusions of law. He was ordered to, and his report purports to, report all his findings of facts.

To illustrate, appellees' 20th exception to the report was that the master failed to find that Mr. Banks, the Chicago manager of the Warehousing Company, "deliberately and intentionally directed the placing of that company's signs inside the enclosure at Stevens

Point and in such position that they could not be seen from the outside where they remained until September 27, 1903, at which time he changed one of them and placed it on the gate facing outward." This charge is repeated in appellee's brief as a *deliberate* omission on Banks' part of steps calculated to give notoriety and a *guilty* participation with the bankrupt to perpetrate a fraud upon its creditors. There is nothing in the record to justify this charge and on this account the master refused to incorporate it into his report. All that the evidence shows is that at first the sign was placed on the inside of the enclosure facing out; that Banks went from Chicago to Stevens Point on the 27th of September, 1903, to deliver from that warehouse enclosure to holders of some of these receipts the property covered by them; and that at this time the sign faced inward and Banks took it and placed it on the outside of the door of the enclosure. (Rec., 87, 88.) There is nothing in this to prove "the scheme of deception" which counsel speaks of.

Besides, if this change of sign made adequate, what was before an inadequate, possession in the Warehousing Company, it made the pledge complete under the Wisconsin law and the bankrupt act as expressly decided by the Circuit Court of Appeals from which the appeal is prosecuted.

*In re Antigo Co.*, 123 Fed., 249.

But it seems unnecessary to further follow the attempts of counsel to vary the master's report.

Counsel also says that the signs in the *Wilson* case were "large" and were "not ambiguous and confusing." But we repeat that the signs in the *Wilson*

case were the same in size and wording as the signs in the case at bar.

Counsel also says that "No agent of the Warehousing Company was seen in either place from the time of starting until the failure." This too is inaccurate. As already stated, the Chicago manager of the Warehousing Company went with holders of its receipts both to Racine and Stevens Point and there unlocked the enclosures and delivered out to such holders goods covered by such receipts. It also appears that at other times orders were forwarded by the Warehousing Company from Chicago to its Racine custodian for the delivery of goods on receipts, and that by reason of such orders deliveries were made (Rec., 113), thus emphasizing the exclusive control of the goods within the enclosures, which that company exercised.

Counsel also produced some papers filed in the Circuit Court of Appeals without its leave or order and claimed to show that one of these appellants had settled his claim and that another had made proof of his as an unsecured claim. These papers have no place in this case. They presented no issue which appellants were called upon to meet in the Court of Appeals. They were properly ignored by that court in its decision, and should be ignored here.

## II.

### EQUITABLE LIEN.

In discussing this question, appellees' counsel says: "We accept as authoritative the recent declaration of the [this] court that there is no material" difference between "the powers and rights of a trustee

under the present act and those conferred by the act of 1867."

This being so, the only question remaining on this branch of the case is, whether this case presents such an equitable right in, or equitable lien upon, the property in question as, under the act of 1867, the assignee in bankruptcy would have taken title subject to.

Counsel, however, contends that the claim of equitable lien is repugnant to the law of Wisconsin, as declared in *Shepardson* v. *Cary*, 29 Wis., 34. That case, he says, held that "the holder of the so-called warehouse receipt failing to establish his legal title, could not obtain relief in equity." But a perusal of that case will show that the question there presented was, whether a former judgment was a bar to a second suit, and the court held it was, because under the code practice prevailing in Wisconsin the claim of equitable lien set out in the second suit might have been presented in the first suit, together with the claim of a legal title. The case is not in point for the further reason that there the claim of equitable lien was made against a *purchaser* of the property before any notice of the equitable lien, and nowhere does an equitable lien prevail against such a person.

Counsel also claims that *Casey* v. *Cavaroc*, 96 U. S., 467, decided that an equitable lien was not good against an assignee in bankruptcy under the act of 1867. Plaintiff in that case was a receiver appointed under the national banking act, and not an assignee in bankruptcy. The case turned upon the Louisiana code under which the only question was whether there was a valid *pledge* or not, this court saying:

"It must not be overlooked that the Credit Mo-

bilier has no other claim to the securities in question but that of pledge,"

and after referring to other cases, saying:

"None of them stood as the present case does, upon the claim of a privilege expressly denied by the law. * * * The Credit Mobilier claims a privilege by virtue of a pledge; and such a privilege, as we have seen, cannot be maintained as to third persons, without possession."

But in a later case, *Hauselt* v. *Harrison*, 105 U. S., 401, the question of an equitable lien, as against an assignee in bankruptcy under the act of 1867, was squarely presented. That case was not, as claimed by counsel, a case of equitable lien *plus* possession. In May, 1874, one Bayer was conducting a tannery in Pennsylvania; Hauselt was a leather merchant in New York, and by written agreement then made Hauselt was to advance money to Bayer, who was with it to buy skins to tan, and it was further agreed that the skins, while in process of being tanned and in the possession of Bayer *should be considered as security for the money* advanced by Hauselt. In November of the same year, Hauselt, after he "had knowledge of Bayer's insolvency and of his intention immediately to file his petition in bankruptcy," took possession, and four days thereafter Bayer was adjudged a bankrupt. If, therefore, Hauselt did not previously have a valid lien, this taking possession was a preference under the Bankrupt Act and gave no lien. The lower court charged the jury that Hauselt "had no right to the possession of them at any time while in the process of manufacture; that the only security given by the contract was the personal obligation of Bayer," and hence that the taking possession was a preference. But

this court held this charge wrong and for this reason reversed, saying (italics ours):

"We cannot agree with the Circuit Court in the construction that the only security given to Hauselt by the contract was the personal promise of Bayer that he would perform it. * * * The clause providing for security must be held to mean something; and it declares that the skins themselves, before delivery of possession to Hauselt under the contract, for purposes of sale, shall be considered as security. * * *

Nor can it be reasonably doubted that this equitable lien was capable of enforcement. * * *

*If, in consequence of his bankruptcy, the property had come into the possession of his assignees, they would have taken it subject to all legal and equitable claims of others not in fraud of the rights of general creditors.* They would be affected by all the equities which could be urged against him."

This case established the law under the act of 1867, and, as counsel admits that in this respect it is the same under the present act, it would seem to follow that appellants have an equitable lien, unless there is something in the attempted distinction by appellees' counsel between "liens in fact" and "promises to give liens."

But on this subject also a decision of this court is fatal to appellees' contention. In

*Walker* v. *Brown,* 165 U. S., 654,

this court had occasion to consider, what would constitute an equitable lien, and there held that a *letter* written by Brown to one, who contemplated giving credit to a firm, of which Brown's son-in-law was a member, stating that certain bonds loaned by Brown to the firm should not be withdrawn from its assets, until the debt of this particular creditor was paid, constituted an equitable lien, and said:

"It is clear that if the express intention of the parties was to create an equitable lien upon the bonds or the value thereof, or if such intention arises by a necessary implication from the terms of the agreement construed with reference to the situation of the parties at the time of the contract, and by the attendant circumstances, such equitable lien will be enforced by a court of equity against the bonds in the hands of Brown or against third persons who are volunteers or have notice. * * *

To dedicate property to a particular purpose, to provide that a specified creditor and that creditor alone shall be authorized to seek payment of his debt from the property or its value, is unmistakably to create an equitable lien."

And in support of this position this court cited with approval the following from Pomeroy on Equity Jurisprudence:

"The doctrine may be stated in its most general form that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers or encumbrancers with notice."

These decisions of this court seem to make it unnecessary to further consider the numerous cases cited by appellees' counsel upon this question of equitable lien.

Respectfully submitted,

HENRY S. ROBBINS.

*Counsel for Appellants.*